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Symposium: De Facto School Segregation - Introduction

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Introduction

Oliver Schroeder, Jr.

THE ISSUE OF *de facto* segregation ignites divergent constitutional philosophies. The contributors to the law phase of this *Symposium* have delineated their respective legal beliefs in cogent articles. Mr. Bloch emphasizes the law as an element for stability through which man's progress develops in measured beat under traditional legal procedures. He contends that the other elements of life identified as psychology, sociology, or anthropology must be accepted by law only after the human community has reasoned, through experience, that law must change. Mr. Carter, on the other hand, invigorates law with positive responsibilities to correct social ills. These corrections are not

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only identified by the disciplines of psychology, sociology, and anthropology, but must be applied to the community by the law as it fixes social policy. In this process human reason seeks to force social experience in order to advance the commonweal.

Roscoe Pound constantly underscores this continuous ebb and flow in law: reason tempered by experience and experience subjected to reason. Mr. Bloch represents forcibly the philosophy which primarily rests on the need for experience. Segregation in fact will be dissipated through human contacts in a multitude of private contacts. People will then be ready for new rules of law to undergird a new community of men free from racial inequality. Mr. Carter, however, underscores vigorously the philosophy which rests primarily on human reason: segregation by rule or custom must be eliminated. Law must sanction this elimination by forcing a community into the new experience of desegregating or even integrating education as a matter of fact.

The reader is further aided in selecting his personal conviction in this affair by the legal scholarship of a third contributor — Judge J. Skelly Wright, a distinguished federal jurist. His inspirational writing discloses the imminent need for a man to mold a just society, whether it be by reason, experience, or a combination of both. And whatever course is taken, any lack of legal unity and

clarity must not be a source of discouragement. The common law system of justice has been ill-equipped to handle the racial confrontation in our country. To understand why this is so will aid our personal deliberations on this most complex of human problems.

Basically, the reason for today's legal turbulence over racial segregation, desegregation, and integration arises from the slavery system in Anglo-American history. When slaves were introduced to the legal system in America in 1619, no place existed to receive this new type of human relationship. In the homeland of the common law, the Englishman had divested himself of slave and serf relationships centuries before. Even when serfdom or slavery existed, the persons involved had legal rights as human beings recognized by law. When the African slave was introduced to the common law society, no human personality with legal rights was recognized. To solve legal complications which arose, the law grasped for applicable rules. These rules were found in the law of chattels; the slave came to be considered exclusively a chattel and in this way the legal problems which arose were easily solved.

How different were the legal experiences with a slave system in other segments of the Western world. The Roman Empire recognized slavery; yet the slave was a human personality. He owed his labor in bondage to his master; but he had legal rights. He could marry and have a family. He was free to travel about within certain geographic areas, much larger areas in size than the slave in Southern United States. He could often buy his freedom, and he was recognized as an entity for legal process as party or witness. Much the same story could be told for the Spanish slavery system in the colonies of Latin America. Here even the Roman Catholic Church had a place for the spiritual personality of the slave. The priest could sanction the master for ill-treatment of the slave who was after all a fellow-Christian. The Spanish legal system was keyed to a slavery legality in the Sixteenth Century in Latin America, because the homeland itself was still experiencing a slavery system with the Moors as late as the Fourteenth and Fifteenth Centuries.

In the Seventeenth Century, the Anglo-American common law lost touch with a slave system incorporating viable legal rights for the slave as a human personality. No other slave system in human history so completely dehumanized a man under the rule of law. The African slave in Southern United States had no spiritual personality. He was not a fellow-Christian and had no legal per-

sonality. And what is most devastating, he could not even acquire such status when granted his freedom, for the United States Constitution prohibited it. So said the United States Supreme Court in the *Dred Scott* case. Today's cattle prod used so unwisely by some officers of the law is a stark reminder that the slave was not a man with legal rights and duties; rather he was a chattel without legal recognition as a person — property like cattle.

The fourteenth amendment completely reversed our legal concept of the Negro slave; not because it imposed duties on the states to provide due process of law and equal protection of the law, nor because it granted legislative authority to Congress to effect these great concepts. The real power in the fourteenth amendment lies in bestowing *citizenship* on the slave. The elimination of slavery by the thirteenth amendment is secondary. A free man without citizenship remains legally inferior, but with citizenship he becomes a complete human personality.

A century ago American law truly reversed legal history. Regretfully, the common law system in America failed the Negro even as a slave. We must be sure it does not fail him as a citizen. How to achieve this goal has been suggested in this *Symposium* by two able lawyers and a respected judge. Their legal beliefs differ widely, but their scholarly analysis can serve each reader well as individual beliefs are worked out for man's most challenging issues of racial understanding and equality.